AMERICAN ARBITRATION ASOCIATION

In the Matter of an **Arbitration** Between	:	AAA #01-15-0004-1639
	:	
Stonington Public Administrators Association	:	
Local #54, Connecticut Independent	:	
Labor Union Local #222	:	**OPINION AND AWARD**
United Electrical, Radio, and Machine Workers	:	
	:	
and	:	
	:	
Town of Stonington	:	
	:	
Grievance: Discharge of Louis DiCesare, II	:	
(Second of Two Louis DiCesare, II Arbitrations	:	
under same AAA Case Number)	:	

Before **Peter L. Adomeit**, **Esq**., Arbitrator

APPEARANCES

For The Employer

Meredith G. Diette, Esq.
Berchem Moses P.C.
Peter Goselin
75 Broad Street
Floor
Milford, CT 06460

For the Union

Peter Goselin, Esq.
The Law Office of

557 Prospect Avenue, 2nd

Hartford, Connecticut 06105

This Award is issued after fully considering all of the voluminous material in both arbitrations, the suspension hearings and the termination hearings. Whether or not expressly referred to in this Opinion, and referring to both the discharge proceedings and the termination proceedings, all of the evidence adduced, authorities cited and arguments set forth by the parties, have been fully considered in the preparation and issuance of this Opinion and Award.

The Parties

The Stonington Public Administrators Association (SPAA) is the certified collective bargaining representative for administrative employees of the Town of

Stonington, Connecticut.[1] The Town of Stonington is a municipal government on this seacoast community providing public services. Mr. Louis DiCesare, II, the Grievant, was at the time of his termination on April 30, 2015, a member of the bargaining unit and the Town's Highway Supervisor.

Procedural Background

This dispute is the second phase of two disciplinary disputes submitted simultaneously to arbitration before the Undersigned Arbitrator pursuant to the collective bargaining agreement between the parties, under the stipulation that the two discipline be tried separately, with the termination arbitration proceeding after the suspension arbitration award issued. In the suspension arbitration, after twelve days of testimony, the Undersigned Arbitrator, without reaching the merits, nullified the suspension on the sole ground that the Town violated the Grievant's *Weingarten*[2] Rights to a Union representative during an investigatory interview before the suspension, especially where as here a Union representative could have corrected an error by pointing out that the town had earlier issued him verbal warnings reduced to writing for three of the incidents, and then punished him again for the same three plus two more.[3] This *Weingarten* issue being dispositive, the merits were postponed until the discharge arbitration, covering the same material, in the interest of economy. Had it not been for the *Weingarten Violation*, the Arbitrator would have sustained the suspension for two of the

[1] The parties collective bargaining relationship is governed by the Connecticut Municipal Employees Relations Act, (MERA), Conn. Gen. Stat. Sections 7-467 to 7-477.
[2] *NLRB v. J. Weingarten, Inc*. 420 U.S. 251 (1975) affirmed a National Labor Relations Board decision that employees have a right to union representation at investigatory interviews. The Connecticut State Board of Labor Relations adopted the same Rule.

[3] For a case applying "double jeopardy" in arbitration, See *In the Matter of Ray Rice,* https://www.espn.com/pdf/2014/1128/141128_rice-summary.pdf (Barbara S. Jones, Arbitrator), where former Federal Judge Jones set aside N.F.L. Commissioner Goodell's indefinite suspension of player Ray Rice because the Commissioner had previously punished Mr. Rice with a two game suspension and $500,000 fine.

incidents, but reduced the suspension to one day.

Issues Presented

At the outset of the first Arbitration hearing of December 7, 2015, the parties discussed dividing the issues into separate arbitrations. The Union invoked Article V [4] of the collective bargaining agreement, requiring us to separate arbitrations. The parties stipulated that in the separate arbitrations, the issues would be the same three as the Town stated in it's online filing with the American Arbitration Association, which Attorney Satti, Town counsel, copied verbatim from the Union's grievance. The first issue was the suspension, the third the discharge, and the second whether the grievance procedure was violated - obviously not by the Union - The Union would not have grieve against itself. Although arbitrability all the issues, including termination, was settled at the outset of these lengthy hearings, and never raised in the twelve hearings over the suspension arbitration, the Town raised it in hearing thirteen, the first hearing over the termination. The undersigned Arbitrator suggested it be included in the issues presented in this, the termination case, and the parties agreed. It will be further discussed later.

The stipulated issues therefore are:

1. Is the grievance arbitrable?
2. If so, was the grievant terminated for "just cause"? [5]
3. If not, what shall be the remedy?

Summary of Award

1. The grievance is arbitrable.
2. The Town of Stonington had "just cause" to terminate the grievant, Louis DiCesare, II.
3. The grievance is denied.

[4] Article V, Section 5.6 of the collective agreement reads in pertinent part: "The arbitrator shall not have jurisdiction to hear or decide more than one (1) grievance without the mutual consent of the Employer and the Union."

[5] "Just cause" is the contractual standard found in Article III, Section 3.1 of the collective agreement.

Discussion and Ruling on Motion to Reopen to Admit Decision of U.S. District Court

After the parties submitted the discharge arbitration briefs, the Town through counsel made a motion, opposed by the Union as irrelevant, to introduce into evidence a U.S. District Court Decision, *DiCesare, II et al. v. Town of Stonington, et al,* No. 3:15-ev-01703 (VAB), parallel litigation in which the Plaintiff, the Grievant here, alleged the Town violated certain state and federal statutory and constitutional rights. The Arbitrator granted the motion to admit the evidence (for what it was worth), to study its relevance, taking the Court case and the Union's objection it under advisement. The Town asserts it is relevant; The Union asserts the decision deals with different legal issues and should not be considered. The Arbitrator agrees with the Union.

The Arbitrator knew about the existence of the Federal Court litigation from an arbitration exhibit of a deposition of Ms McKrell, and the presence in the arbitration room from time to time of observers, introduced as attorneys working on some Federal litigation, the details of which were not then explained. Otherwise the Arbitrator was unaware of the specific claims or defenses in the litigation, until the Town moved to introduce the Court decision.

U.S. District Court Judge Bolden's written opinion reveals that Mr. DiCesare had first brought an action in State Court, alleging violations of state and federal law and state and federal constitutions. Because the federal claim fell within the removal jurisdiction of the U.S. District Court, and the state claims fell within the supplemental jurisdiction of the Federal Court, the Town removed the entire case to Federal Court.

U.S. District Court Judge Bolden on cross motions for summary judgment dismissed all federal claims. Judge Bolden ruled that the instant Arbitration satisfied the grievant's *Laudermill* [6] federal law Due Process rights and dismissed the Due Process claims. Judge Bolden also dismissed the FMLA (Family Medical Leave Act) retaliation claims, on the grounds the plaintiff produced insufficient

[6] *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985)

evidence that the Town retaliated against the Grievant for filing for FMLA leave. The court ruled that temporal proximity does not create causation, that the adverse job events started well before he filed for leave under FMLA, and that the plaintiff did not demonstrate he had sufficient evidence to create a triable issue of fact. Because there was no viable federal claims left, and following 28 U.S.C. § 1367 (c)(3) and U.S. Second Circuit Court of Appeals precedent, the Court declined supplemental jurisdiction over the state law claims, and remanded them without decision on their merits back to state court. [7] Judge Bolden's dismissal of the federal statutory and due process counts constitute a final judgment on those counts. [8]

I agree with the Union that this decision is not binding on the arbitrator, and has no bearing on whether the town had "just cause" to terminate. The federal court rights asserted were statutory and constitutional, whereas the rights asserted in this arbitration are based on "just cause" and created by the collective agreement. A finding that a claim of termination in retaliation for filing a FMLA for is not established the temporal proximity, is not relevant to the Union' claim that the Town retaliated against the Grievant for joining the Union.

I conclude the U.S. District Court decision is not binding on the issue of "just cause."

Discussion and Ruling on Issue One (Town's Arbitrability Defense)

For the first time in these lengthy proceedings, on the thirteenth hearing (which was the first hearing on the termination issue), the Town raised the defense of arbitrability. If the dispute is not arbitrable, then the Arbitrator lacks authority to issue a final and binding award. The parties agreed that the Arbitrator should decide the defense as the first issue. Its importance suggests the Arbitrator should address it first.

The Town asserts the termination is not arbitrable because the Union did not follow certain steps in the grievance process, including mediation, before

[7] The Arbitrator is unaware of the current status of the state law claims.
[8] The Arbitrator is unaware of whether the final judgment dismissing the federal claims was appealed.

arbitrating. The Union asserts the Town agreed to arbitrate when it initiated Arbitration with the AAA of the Union's grievances, and agreed again in Hearing #1 on December 7, 2015 to arbitrate the Union's grievances. The Union concludes that the discharge grievance is arbitrable.

The Arbitrator agrees with the Union. The Town's position is without merit. The termination is arbitrable because the Town agreed it was arbitrable on the July 13, 2015 AAA "Online Filing for Arbitration." The Town agreed it was arbitrable a second time on December 7, 2015 at the first time the parties met with the arbitrator.

Attorney Satti exercised the Town's contractual [9] choice to initiate arbitration of a Union grievance with the American Arbitration Association, rather than a proceeding before the State Board of Mediation and Arbitration. Attorney Satti identified himself on the Online Filing as Attorney for the Town. The Filing sets forth, verbatim, the three issues presented by the Town by the Union:

> "Suspension - 5 days unpaid."
> "Alleged failure to follow grievance procedure."[10]
> **"**Discharge**."** (Emphasis added.)

The Town agreed to arbitrate the discharge a second time at the first arbitration hearing on December 7, 2015. Attorneys Satti and Goselin agreed that each arbitration would be completed before the next one began. The Arbitrator suggested and the parties agreed to stipulate that evidence admitted in the first hearings would be admissible in the later arbitrations. Tr. 12-7-15 p. 44, 46. The issue of arbitrability was not made an issue. To the contrary, Attorney

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[9] Collection agreement, Article V Section 5.5 states: "Grievances appealed to arbitration shall be submitted to the State Board of Mediation and Arbitration, with a contemporaneous copy to the Town, **or at the Town's option and expense** to the American Arbitration Association in accordance with its rules and procedures." (Emphasis added.)

[10] Attorney Satti copied the Union's grievance, word for word. The Union's grievance complained the Town failed to follow procedures. The Union did not file a grievance saying the Union failed to follow procedures; the grievance was against the Town.

Satti stated:

> "I'm going to say that the Town has filed those demands [for arbitration with AAA] based upon the way the Union filed theirs, the way that Union and Mr. DiCesare filed them, because we wanted there to be a global decision, resolution one way or the other." Tr. 12-7-15, p. 29.

Union Representative Barbara Resnick summarized the parties agreement as follows: "So there are three separate grievances; the suspension for just cause or not, which is the first issue; the second one is they [The Town] failed to follow the procedure of responding to grievance;[11] and the third is the termination grievance." Tr. 12-7-15, p 39.

At the time Attorney Satti entered into the stipulation, he presented the Town with full authority to act on its behalf. The stipulation was by its terms meant to be binding and to control three disputes, including the now-concluded suspension arbitration and the termination arbitration.

From that time forward, the train had left the station carrying the three Union issues. All three issues had tickets to ride, paid for by the Town, because under the contract, the Town had the option to initiate arbitration with the American Arbitration Association, but by selecting pays all the fare. Had the town not exercised this option, the arbitration track went to the door of the State Board of Mediation and Arbitration. The Town exercised its contractual option not to take State Board train, and instead went over to the American Arbitration Association station. The Arbitrator holds the Town to its stipulation made by Attorney Satti on its behalf of December 7, 2015. Having made it, the Town cannot unilaterally withdraw it. The grievance is arbitrable.

Town Position

The Town had just cause to terminate Mr. DiCesare. Mr. DiCesare failed to fulfill his responsibilities a Highway Supervisor, a position which his job

[11] The Town's alleged failure to follow procedures became moot after the undersigned Arbitrator's Award in the Suspension Arbitration, and the Union has waived a third arbitration hearing on the Union's procedural complaints.

description outlined what was expected of him, including from the job description the following duties: Mr DiCesare's duties included the "day-to-day operations of the Highway Department"; "the preparation of work schedules"; "the preparation of advance logistics for upcoming projects"; "ordering needed materials"; "obtaining necessary equipment and supplies as appropriate." "The position requires independent judgment, initiative, maturity, observation and communication skills, and accuracy."

Mr DiCesare's duties required that he "[a]ssist the Director of Public Works with prioritizing Highway Department projects [and] plan work schedules of all highway personnel, including daily work assignments." Mr DiCesare's duties included "… mak[ing] detailed plans to accomplish goals… and [inspecting work for conformance with specifications and standards and [r]eporting work accomplished to the director of public works." The Town required Mr DiCesare as Highway Supervisor to have: "knowledge of computers to complete correspondence, reports, budgets and data entry"; "the ability to read and follow oral and written instructions"; and the "ability to plan.

Mr DiCesare had full knowledge of Ms McKrell's expectations and of his job requirements but repeatedly rebuffed her assignments. On January 7, 2015, Ms McKrell provided Mr DiCesare with memorandum reading, "Notification of Meeting Concerning Potential Discipline." Six pages in length, with 36 pages of exhibits, and a hearing over his insubordination and performance issues would take place on January 9, 2015. Following the hearing, Ms McKrell suspended Mr DiCesare for five workdays.

Anticipating his return after his leave of absence of approximately three months, she prepared a memo stating she was moving his office from the Highway Department Garage to Town Hall, where, she said, all of his Union had offices, to have better and regular communication.

She prepared a daily work schedule to assist him in gaining more organization, efficiency, and planning time, which she believed he wholly lacked prior to his suspension. She believed a regular work schedule would make him more accessible to others wanting to speak with him.

She prepared minutes from prior weekly meetings between them occurring before his absences. She attached a report about the Elmridge catch basins and asked him to prepare a written explanation of the project and the outcome. She intended the meeting to assist Mr DiCesare in transitioning back to work with clear expectations. She prepared a Performance Plan for the meeting of March 23, 2015. The expectations were leading daily operational meetings, planning monthly department meetings, completing the daily planning document every week, completing the daily work assignment sheets every day, and undertaking and documenting daily inspections. She discussed the Performance Plan with Mr DiCesare at the March 23, 2015 meeting. At their weekly meeting of April 8, 2015, she spoke with him about his failure to schedule monthly highway meetings in advance using Outlook and his continued refusal to complete Daily Work Reports. She explained these worksheets enabled the department to insure that the 18 employees supervised by Mr DiCesare in the department to be working all hours of their workday. She gave Mr DiCesare the option to using a computer spreadsheet template she created for him or on paper, and provided him with several copies. In response to the deficiency report on the Elmridge catch basins prepared by Town Engineer Scot Deledda, Mr DiCesare wrote that he put Joe Curioso in charge of the Elmridge Paving project and did not go out on that project himself.

Following this meeting, Mr DiCesare's performance did not improve. He continued to fail to complete daily planning worksheets, choosing not to undertake any advance planning for the employees he supervised.

She repeated her expectations in the above areas during their daily meeting of 03/30/15.

He continued to rebuff her efforts to have him complete daily work sheets. She detailed precisely what information she expected him to include. While he claimed to her to be completing the daily work sheets, Mr DiCesare had decided to stop completing the weekly planning worksheets entirely. Despite all her work, he failed to complete the weekly planning worksheet for April 20-April 24.

On April 25, 2015, Ms McKrell uncovered that while Mr DiCesare was

claiming to have completed the weekly and daily worksheets ahead of time, he falsely claimed to him that he had created them in advance, whereas in fact, Mr DiCesare had created them after the fact.

On April 20, 2015, Ms McKrell uncovered that Mr DiCesare continued to refuse to record each day the time of the employees he supervise, as she had previously directed him to do. Instead, Mr DiCesare would attempt to complete the biweekly timesheets prior to the payroll deadline based on his memory, notes on a bulletin board, and information from the relevant employees. Her purpose was to insure that the time records were accurate.

Ms McKrell had directed Mr DiCesare to accurately record, on a daily basis, the leaves of absences for the employees Mr DiCesare supervised, and enter the data into the Town's computer system. Her purpose was to insure that the leave records were accurate.

Ms McKrell immediately addressed this with Mr DiCesare. The following week, she discovered he still refusing to perform the task, in direct contravention of her instructions.

In or around August of 2014, despite some concerns she had with a previous paving project Mr DiCesare managed on Deer Ridge Road, she agreed with Mr DiCesare's request to assign him the supervision and oversight of the Elmridge Road paving project, after Mr DiCesare repeatedly assured her he could handle such an assignment and asked her for a chance to prove himself.

The Elmridge Road paving project ended around September of 2014. In December of the same year, Ms McKrell asked Town Engineer Deledda to inspect the catch basins on this specific project to see if they met applicable engineering standards She made the request after being told by another Public Works employee, Joe Curioso, that there were significant problems with the catch basins on the recent Elmridge Road project, the one which Mr DiCesare as his own request supervised.

Engineer Deledda's report confirmed that the Town's Public Works department incorrectly multi-stacked metal risers, meaning they placed one on top of another, and used metal shims to level the multi-stacked risers. The report

concludes that the multi-stacked risers and metal shims could over time cause the catch basins to become unstable and cause a hazard in the road.

Joe Curioso, a Highway Department employee, informed Ms McKrell that Mr DiCesare knew about the double-stacked risers on Elmridge Road and approved the practice.

Ms McKrell provided Mr DiCesare a copy of the Engineer's report in January 2015. She provided him with a second copy and discussed it with at a meeting on March 23 following his return to work from his leave of absence. She asked Mr DiCesare for a written explanation.

He subsequently submitted a written response stating he had little involvement in the Elmridge Road paving project, which he assigned the supervision Joe Curioso, whom he now blamed for the project errors.

After receiving Mr DiCesare's written response, Mr DiCesare met with Mr Joe Curioso, who contrary to Mr DiCesare's response, advised Ms McKrell that Mr DiCesare had sent Joe Curioso to the Elm Street Road with a truck full of metal risers and told Mr Curioso to ascertain the necessary riser heights.

Mr. Curioso testified he contacted Mr. DiCesare and informed him that the catch basins already had risers and that the riser height to replace those existing and add additional height exceeded the riser sizes the department had on hand, at which point Mr. DiCesare instructed Mr. Curioso to double-stack the risers.

Mr. Curioso testified that Mr. DiCesare had also instructed the town's Master Mechanic, Steve Burdick, to prepare metal shims to level the catch basins where needed.

Ms McKrell then spoke with Ernie Santos, who confirmed Mr. Curioso's statements.

Following these conversations, Ms McKrell spoke with Mr DiCesare about the double-stacked risers, to which, she testified, Mr DiCesare now stated to her that he had double-stacked risers on other projects and he believed the practice to be sound, thereby contradicting, his earlier written statement that he was not in charge. Ms McKrell concluded, in his earlier written statement, he once again failed to be truthful in answering her concern over his inability to complete his job

assignments.

Mr. DiCesare's constant repudiation of Ms McKrell's clear, detailed instructions concerning his daily and weekly pre-planning resulted in Mr DiCesare's incapacity to adjust their schedules after the discovery of pre-existing risers in the catch basins to avoid the multi-stacking. Aware of the problems on day one of the project, Mr DiCesare allowed the paving on day two instead of informing Ms McKrell of the situation and seeking assistance.

Towards the end of the latter half of April of 2015, Ms McKrell believed that further discipline was warranted because of a) Mr. DiCesare's demonstrated refusal to complete reasonable task assigned by her; b) Ordering multi-stacking of risers and the use of shims on the Elm Road Paving Project; and 3) Lack of candor concerning the performance of his work assignment. She met with the Town's Director of Administrative Services, Vincent Pacileo to discuss further steps.

On April 30, 2015, at approximately 7:00 AM, Ms McKrell summoned Mr. DiCesare and his Union representative, Wayne Greene, who was then the Local Union's Vice President and a former President. She gave Mr. DiCesare a pre-disciplinary letter, which he signed, advising him of his right to Union representation, and directed Mr. DiCesare to come to her office at 7:30 AM that morning, for the purpose of discussing her intention to terminate his employment and "to provide you with an opportunity to explain your deficiencies."

Mr. DiCesare did not request a Union representative other that Mr. Greene. Although Mr. DiCesare stated he did not have sufficient time to prepare, neither man requested a postponement.

At the 7:30 AM meeting, Ms McKrell, using a list of questions which she had prepared, she asked Mr. DiCesare eight questions. The first two dealt with the Elm Wood paving project. She asked him whether he had any discussions with Ernie Santos about any work Mr. DiCesare asked Mr. Santos to do while paving was ongoing at the Elmridge Road last September. She asked Mr. DiCesare what he directed Mr. Santos to do with the catch basins on this project. She asked why he "continuously refuse[d] to complete daily work sheets"? She

asked why the “first week of employee time sheets for the payroll period of April 19, 2015 had not been completed as I directed you to do on April 20, 2015?” [She was asking him this question on April 30, 2019, ten days after the payroll period ended.]

She asked, “Why you have not addressed the issue of employees being out of work without leave” and referred to “eight occasions that this has happened since your return from leave.” [He returned from leave on March 23, 2015]

She asked him to “explain why you have not been seen by the majority of your crews at the end of days from March 23, 2015 to the present and why you have requested Joe Curioso to provide you with inspection reports when it is your responsibility?”

She asked him whether he was “working for North Stonington at any time between January 30 and March 23, 2015?” She asked if so, for “how many hours and/or days per week” for the same period [This was the period of time when he was on a medical leave of absence.]

Mr. DiCesare stated in reply that on the advice of counsel, he would not respond to seven of the questions. He did acknowledged working for the Town of North Stonington. He refused to provide additional information or explanation.

Ms McKrell did not conduct any further investigation. The Town decided to terminate Mr. DiCesare’s employment.

The Town satisfied the requirements of a pre-termination hearing. Ms McKrell met with Mr. DiCesare and a Union representative, asked pertinent questions about the investigation, which, except for one, he refused to answer. The purpose of the doctrine is to allow Mr. DiCesare an opportunity to have his say. If Mr. DiCesare choses to refuse to answer questions, he cannot by refusing delay the discipline.

Later that same day, April 30, 2015, at around noon, Ms McKrell summoned Mr DiCesare to her office and gave him his termination letter. I have divided the two-page letter into segments below for ease of reading. The letter has seven unnumbered paragraphs. Attached to the letter was a short affidavit

from Ernie Santos contradicting Mr. DiCesare's earlier statements to Ms McKrell that he spent little time at the Elmridge project and was not in charge of it.

The letter stated the Town suspended him for five days in January 2015, for "instances of insubordination and poor planning." He "ignored" Ms McKrell's directives. He "demonstrated outspoken and unprofessional behavior." As of January 20, 2015, the date of his suspension, the cost of correcting his mistakes totaled $106,647.00."

The letter stated that he "managed the paving project on Elmridge Road and states the dates of August 19 and September 17 and 18. The letter states that the Town's Engineer, Scot Deledda, inspected the work and issued a report on December 31, 2015, which report was twice given to Mr. DiCesare.

The letter states that Engineers report "concluded that 19 catch basins need permanent repair."

The letter states that the Engineer's report concluded that "[c]atch basin frames have multiple metal risers stacked on top of each other These can become unstable over time {sic}" and that "the leveling spacers may become dislodged and worsen the overall condition."

The letter states that the Engineer's report found that "the pavement is not flared/sloped properly … creating an abrupt drop into the basins which puts added stress on the basin tops and makes for an uncomfortable ride in the road." The letter states that "a portion of the catch basin frames were also set too high."

The letter states that the estimated cost of the repairs to correct his errors was $59,457.00.

The letter states that Mr. DiCesare "lied to me [Ms McKrell] when I asked you for a written explanation in which you claim that the shoddy planning was another Town employee's fault. You also lied when you told me you were unaware of the double stacking of the risers until I provided you with Scot Deledda's report on January 7, 2015."

The letter refers to her interviews with Joe Curioso as well as others "who were present during the two (2) days of paving on Elmridge" and who "stated, under oath, that you instructed them during the paving in September to take

risers back to the Highway garage to weld metal shims to the risers. You clearly know this was not best practice and your misrepresenting the facts to me is simply inexcusable and demonstrates a lack of credibility as well as poor judgment of someone in a supervisory position."

The letter then states that "[y]our written explanation dated March 27, 2015 states that your involvement on Elm street was 'very little' and that you "… had only visited the site twice for a very short time and left the operation to Joe C. to overlook…' You were the Highway Supervisor at the time that work was performed on the Elmridge Road, and you were present at the site more than you stated in your response. See Affidavit of Ernie Santos attached hereto. You were involved in the manual labor of setting the catch basins at the site, and did not cease work when the catch basins were being improperly placed before the paving was finalized. Your attempt to place blame on other Town of Stonington Highway employees for the work that you directed them to perform and are responsible for overseeing is remarkable."

The letter then states: "Additionally, you are responsible for checking and updating the timesheets for all Highway employees as a daily job function. For the pay period of April 5, 2015 through April 18, 2015, you did not correctly log in the time for 11 out of 18 Town of Stonington Highway employees. I alerted you of this concern by email dated April 20, 2015. However, again on April 26, 2015, I discovered that the timesheets for the pay period of April 19, 2015 through May 2, 2015 were also incomplete; you failed to properly account for the time worked by 12 out of 18 employees in that payroll period. There were also eight occurrences of employees being out of work without them having any accrued sick or other vacation and/or personal time. I asked you to address this with the employees and you have simply failed to address this issue.

The letter then states: "Furthermore, one of your essential job functions pursuant to your Job Description as Highway Supervisor is to coordinate and direct projects as well as perform the administrative function of writing daily planning and end of the day inspection reports. These reports provide essential planning needed to efficiently direct the Highway employees, which is over

$4,000 daily and $20,000 weekly. In the month of April, 2015, you did not turn in daily work sheets reflecting what work you had assigned to them for at least five days, which demonstrates a clear disregard for the job you are expected to perform daily. You have also failed to have those daily work sheets prepared prior to the beginning of the work day by 7AM, and have relied upon Joe Curiosa to perform that function. Your Highway Weekly Work Schedules are also incomplete which illustrates that you are not properly planning the hours necessary for the manpower that you have direct control over.

The letter then states, “Therefore, it is clear that you have no desire or capability to manage the workforce. As for your daily inspections at the end of the day, it has come to my attention that you are also not conducting those as we have discussed. Several Highway Department employees have advised me that they have not seen you at the end of the day to check their work for that particular day. The employees have however seen Joe Curiosa inspecting on your behalf. It is clear that you are simply not adhering to your job description or my directives to you concerning my expectations of you as Highway Supervisor.

The letter concludes: “As a result of your insubordination, poor performance, lack of credibility, inadequate planning and financial repercussions to the Town as a result of your conduct your employment is terminated.”

Ms McKrell attached to the letter a two-page affidavit of Ernie Santos, a Truck Driver and Laborer, who states he was at the Elmridge Project on September 17, 2014 at 10:00 AM, working on a grate. It contradicted Mr. DiCesare’s previous statements to her that he was hardly at this site and had turned its management over to Mr Curioso. It shows Mr DiCesare issuing orders to Mr. Santos to return to the shop, have a steel shim cut, and return the shim to the job site, where Mr. DiCesare helped Mr. Santos install the grate. At noon, Mr. Santos spoke with Mr. Curioso, about whose “bright idea was it to do the catch basins like this?” Mr. Curioso replied, “The boss”, a reference to Mr. DiCesare.

Mr. DiCesare knew the Town’s expectations, which were reasonably related to the orderly, efficient and safe operation of the Town’s business. The Town provided Mr. DiCesare with notice of the charges against him. He knew

through numerous meetings with Ms McKrell that he was not performing in specific ways to specific requests. The Town observed and investigated Mr. DiCesare's insubordination and work deficiencies. The Town provided Mr. DiCesare with an opportunity to respond to the charges against him on April 30, 2015.

Without conceding the pre-termination procedures to his termination were deficient, the Town' post-termination due process provided to him cured any deficiencies in the pre-termination due process procedures.

The Town exercised reasonable and evenhanded application of discipline given the gravity of Mr. DiCeare's conduct.

The correct remedy is termination. Alternatively, should the arbitrator find no just cause, reinstatement is inappropriate. Mr. DiCesare throughout his employment repeatedly refused to comply with her reasonable directives, failed to take action toward improving his work performance, lacked the ability and/or willingness to respect her authority.

The individual holding the position of Highway Supervisor position since Mr. DiCesare's departure in April 2015 completes the daily and weekly planning worksheets in the timeframe required by Ms McKrell, he tracks the work hours of the Public Works employees on a daily basis, he reviews leave requests and time available for the Public Works employees in the time frame dictated by McKrell.

The Town also cited numerous legal authorities.

Union Position

From the time of the five-day suspension on January 7, 2015 until the termination on April 30, 2015 Mr. Lou DiCesare's supervisor Ms Barbara McKrell and the Town conspired to falsify evidence regarding Mr. DiCesare's performance, impose demeaning and humiliating working conditions on Mr. DiCesare, violate Mr. DiCesare's right to representation by the Union, and deprive Mr. DiCesare of procedural due process. From the time of his employment in 2009 to his termination on April 30, 2015, the only valid

disciplinary action taken against Mr. DiCesare was a verbal warning given on October 8, 2014. The Town's five-day suspension given to Mr. DiCesare on January 20, 2015, was overturned by the Arbitrator's decision on the suspension. Mr. DiCesare was on town-approved leave of absence for treatment of high blood pressure from January 29, 2015 until March 22, 2015.

In the last five weeks of Mr. DiCesare's employment, Ms McKrell took steps intended to justify Mr. DiCesare's termination. These included the creation of a bogus Performance Improvement Plan, which the Mr. DiCesare testified Ms. McKrell never gave it him, and was defective in not containing a means to measure improvement, an "investigation' into work done on the Elmridge project that falsely claimed that Mr. DiCesare had committed errors costing the Town $59,457.00, and the imposition of demeaning working conditions that substantially interfered with Mr. DiCesare's ability to get his job done.

Having created the false justifications for termination, on April 30, 2015, Ms McKrell pressganged a Union steward into representing Mr. DiCesare, giving him thirty minutes to prepare for a pre-termination hearing. Without providing Mr. DiCesare with any statement of the charges against him or any of the evidence purportedly supporting those charges, Ms McKrell asked him a series of questions without explanation, and recalled him a short time later with a pre-prepared termination letter.

The Elmridge "Investigation" was defective and inaccurate.
In October 2014, Mr. DiCesare oversaw repair work being done on Elmridge Road. One of two paving projects that Ms McKrell assigned to Mr. DiCesare to do on his own and without oversight, even though she testified he lacked the skills necessary to do so, and The Town Engineer discovered double-stacked risers, which she herself never investigated. Her claim that they were "dangerous" and a "potential" and costly was undercut by the sole repair bill was for a welder for $325, and by the Town's failure to correct the situation for four months form the Engineer's Report, until the welder appeared on the date she terminated Mr. DiCesare. The next repair on this road was two years later

On January 20, 2015, when Ms McKrell gave Mr. DiCesare a five day

suspension, she stated, regarding Elmridge: "As you are aware, your suspension does not include any discipline related to work you were responsible for on Elmridge Road nor any information that may be brought to my attention as a result of the catch basin assessment completed by Town Engineer, Scot Deledda on Elmridge Road. Ms McKrell testified that Elmridge was not a subject of disciplinary action on January 20, 2015, because she was "still investigating," but conceded that the additional investigation was solely to interview other employees who might have been present. On February 17 and 18, Ms McKrell obtained affidavits from Joe Curioso and Tim Keena regarding the Elmridge work. Ms McKrell also assembled a number of other documents relating to the Elmridge project, including one titled "Construction Costs; Project: Elmridge Road Catch Basin Repair" that estimates that rebuilding the catch basins and related work would cost the Town a total of $59,457.00. This number re-appears in Ms McKrell's April 30, 2015, termination letter, in which she states that "The Town now estimates that $59,457.00 in repair costs are needed to correct your errors . . . "The statement is patently false, since, as noted above, no repair work had been done at all on Elmridge catch basins until the date of the termination[12] and no further work until two years later.

None of the documents created in Ms McKrell's "investigation" of the Elmridge project – affidavits by subordinates or documents ostensibly showing the "cost" to the Town – was ever shown to Mr. DiCesare prior to his termination.

The Town's claim in Attorney Satti' opening statement in the suspension arbitration that the cost was $78,000 was never proven The Town has not entered any evidence of any actual cost incurred because of Mr. DiCesare's handling of the Elmridge project, except for the welder's invoice for $325.00.

None of the documents created in Ms McKrell's "investigation" of the Elmridge project – affidavits by subordinates or documents ostensibly showing the "cost" to the Town – was ever shown to Mr. DiCesare prior to his termination.

Shortly after Mr. DiCesare returned from leave of absence on March 23,

[12] The Arbitrator finds it was an estimate, not a bill, and inaccurate.

2015, Ms McKrell gave him a document titled “Update of Work” which included, inter alia, a number of significant changes to Mr. DiCesare’s schedule, including where and how he would do most of his work. (Town Ex. 30) McKrell describes these changes as “a rearrangement of items to help him with completing his work assignments.” In fact, this
“rearrangement” was a wholesale revision of Mr. DiCesare’s schedule, and included changes and restrictions that were arbitrary, demeaned Mr. DiCesare in his work as a professional, and interfered with his ability to do his job.

The Update of Work instructed Mr. DiCesare that his office had been moved from the Town Garage – where he could directly interact with the employees who reported to him – to Town Hall. (Town Ex. 30) Ms McKrell acknowledged that after terminating Mr. DiCesare and replacing him with Joe Curioso, the latter moved his work area back to the Town Garage. While Ms McKrell testified that the purpose of the relocation was so that Mr. DiCesare could work closer to her, the memo also reflects that she directed him to give notice “to administrative staff when you leave the office every day”, a condition not imposed on other administrative staff.

Although Ms McKrell testified that other SPAA members worked out of offices in Town Hall, there is no evidence that their work required them to supervise employees in the field, as Mr. DiCesare indisputably did, nor that they were required to notify their administrative staff before leaving the office. Ms McKrell acknowledged in her testimony that prior to his leave of absence Mr. DiCesare had “spent a significant amount of time out in the field.” There is no evidence in the record to suggest that Mr. DiCesare spent excessive amounts of time working in the field, or that he spent more time than was necessary to supervise his staff. Nor had he ever been disciplined in any way for spending excessive time in the field or for failing to perform work in the office.

However, the Update of Work set a new schedule for Mr. DiCesare, in which he was limited to one hour in the field – from 2:00pm to 3:00pm, and for which “Any deviation from this schedule will need to be approved in advance.” (Town Ex. 30) Ms McKrell’s testimony about this provision in the memo relates to

changes in schedule for Mr. DiCesare's employees and provides no explanation for requiring that Mr. DiCesare obtain approval in advance for his changes in schedule.

On cross-examination, Ms McKrell explained that she directed Mr. DiCesare to change the way that he kept track of employees' time, including preparing daily reports and not using his previous method of collecting information from a paper record that was kept on the wall in the garage. Ms McKrell also conceded, however, that Mr. DiCesare's replacement continues to use the paper record on the garage wall. Ms McKrell claims that "inspectors did and certainly do" tell administrative staff when they leave the office was inaccurate.

Ms McKrell concedes that at no time prior to April 30, 2018, had she informed Mr. DiCesare that he was at any risk of being terminated. Nor did the Town consider that the Union was informed of any disciplinary action against Mr. DiCesare until 7:00am on April 30, 2015, when then-vice president of the SPAA Union, Wayne Greene, arrived at City Hall. Ms McKrell, who was also Greene's supervisor, ordered him to come to her office with the words "I want you in my office right now" , in an angry tone made him feel that he might be in trouble, and when he asked what it was about, she refused to tell him, instead responding "You'll find out in a minute." After a moment, arrived in the office and had a short conversation with Ms McKrell. Greene still did not know what was going on or why he was there. Mr. DiCesare has testified that he did not know that Greene was the vice president of the Union at that time. Ms McKrell gave Mr. DiCesare a document titled "Notice of Right to Representation" which was dated April 30, 2015, and which read in part, "You are hereby directed to report to my Office on Thursday, April 30th at 7:30am for the purpose of discussing my intention to termination your employment with the Town of Stonington and to provide you with an opportunity to explain your deficiencies." Mr. DiCesare signed, acknowledging receipt of the document. Mr. Greene and Mr. DiCesare then left the office. Town Exhibit 119 is the only document provided to Mr Mr. DiCesare as part of the termination process.

When they returned, Ms McKrell told Mr. DiCesare she had questions she wanted him to answer. Mr. DiCesare asked if he could see the questions first and she denied that request. It was only when Mr. DiCesare stated that he wanted representation in the meeting that Ms McKrell stated that Greene was to be Mr. DiCesare's Union representative.

Greene testified that he had never been in that situation before. Mr. DiCesare testified that he asked for a different Union representative, but that Ms McKrell proceeded anyway. (Ms McKrell then proceeded to ask Mr. DiCesare a series of questions, and to each he responded that he wanted the opportunity to review the questions before answering. When Ms McKrell finished asking questions, she then dismissed the meeting.

After meeting with Mr. DiCesare and Greene, Ms McKrell testified that she attended a meeting that included the Town's labor counsel, and that after that meeting she informed Mr. DiCesare that he was terminated. Town Exhibit 10, "Termination Memorandum," purports to reflect the reasons for the Town's termination of Mr. DiCesare.

The "just cause" standard requires that the action taken by management be reasonable in light of all of the circumstances and reflect basic principles of fairness. [Citations omitted]

The doctrine requires that management's decision may not be arbitrary or discriminatory and must follow fair procedures and due process and be applied in a uniform manner. [Citations omitted] Management's decision to terminate Mr. DiCesare was arbitrary and discriminatory. As discussed above, following the Town's five day suspension of Mr. DiCesare on January 20, 2015, and Mr. DiCesare's leave of absence for high blood pressure, he returned to the job for about five weeks: from March 23 to April 30. In preparation for Mr. DiCesare's return to work, Ms McKrell testified that she prepared a "Performance Improvement Plan" and, in so doing, rejected proposed edits by the Town's Director of Administrative Services that would have helped Mr. DiCesare to determine what he was supposed to accomplish and to measure whether or not he was making progress over a specific period of time.

Taken at face value, the PIP in its final form is a sham in that it merely sets the expectation that Mr. DiCesare begin doing his job exactly as Ms McKrell wanted, with no review of the process, no timelines, and no metrics showing progress. Even more troubling, however, is that Ms McKrell testified she prepared the PIP to assist Mr. DiCesare, but there is no evidence that she ever provided it to him. Indeed, Mr. DiCesare credibly testified that in the first two meetings after his return from leave, Ms McKrell never said anything about a performance improvement plan and did not discuss any areas in which she wanted Mr. DiCesare to improve his performance.

Ms McKrell's assertions that Mr. DiCesare caused a dangerous situation that cost the Town $59,457.00 as a result of his handling of the Elmridge project are demonstrably false. The evidence shows that, following the Town Engineer's review of the work on Elmridge Road, issued on December 31, 2014, no work was done to correct those "dangerous" conditions until April 30, 2015, and consisted solely of a simple welding job that cost the Town $375.00.

Finally, there is evidence that Ms McKrell made major changes to Mr. DiCesare's work location and schedule that were intended to demean him as a professional and interfere in his ability to do his job. An examplar is Ms McKrell moving Mr. DiCesare's office and giving him directions to change how he tracked employee time. Ms McKrell ultimately conceded that she had no knowledge that the way that Mr. DiCesare did the job was inaccurate, it simply was not how she wanted him to do it. To a great degree, Mr. DiCesare's replacement does the same work the same way in the same location that Mr. DiCesare had previously done. All of this evidence points to a predetermined outcome. Ms McKrell was determined to find fault with Mr. DiCesare's work even if she had to make up evidence to support it. The above examples of Ms McKrell's results-driven "performance improvement" process are sufficient to show that the termination itself was for reasons that are arbitrary and discriminatory.

Even were that not so, there is compelling and overwhelming evidence

that Mr. DiCesare was not provided with “fair procedures and due process.” By Ms McKrell’s own admission, Mr. DiCesare was never put on notice that he was facing possible termination until the morning of April 30, 2015, after the decision had already been made. Yet no effort was made to even provide a fair process on the day of termination: Mr. DiCesare was ambushed and his Union representative dragooned by Ms McKrell into the process, with no advance notice. Mr. DiCesare was never apprised of the nature of the accusations against him or any of the evidence associated with those accusations, nor was he afforded any meaningful opportunity to respond to those allegations. Even the questions that the Town had concocted to justify Mr. DiCesare’s termination were never provided to him in writing – and that was, as it turns out, inconsequential since the Town terminated him without his ever having answered the questions.

In the process leading up to the Town’s five day suspension of Mr. DiCesare, the Town justified some of its actions in not providing due process by claiming that Mr. DiCesare was not guaranteed due process because he was not a member of the Union at that time. The Arbitrator rejected that argument. Here, in considering termination, the Town was well aware that Mr. DiCesare was entitled to all the rights of a Union member and yet that only resulted in a more concerted effort to deprive him of those rights.

For these reasons, the Union asks the Arbitrator to find that Mr. DiCesare was not terminated for just cause and asks that he be made whole, including reinstatement, adjustment of seniority, and payment of back wages and benefits.

Discussion

Credibility

Ms McKrell believed the grievant was not credible, based on her numerous interactions with him. The Arbitrator agrees.

The employer bears the burden of proof. A charge not proven cannot support discipline. Conflicting evidence does not mean a charge is unproven. When evidence conflicts, the Arbitrator must sort through the conflict to determine the facts. To determine whether testimony is credible, the Arbitrator considers

many factors: whether the witness has an interest in the outcome of the proceeding; the witnesses ability and opportunity to perceive events; to accurately remember; and to accurately relate an event. That two witnesses to an event differ does not necessarily mean that one is being knowingly untruthful. Witnesses often perceive events differently. On the other hand, a witness who changes his or her story when confronted with facts disproving that witnesses original account creates a reasonable inference that the witness is not credible. The Arbitrator must rely the testimony's substance, the amount of detail, whether consistent or inconsistent with other witnesses and evidence, whether likely or unlikely, whether reasonable under all the circumstances. The Arbitrator must consider whether a witness is being direct or evasive, or incomplete, or leaving out facts, as well a body language and inflections. The Arbitrator can reject uncontradicted testimony if it is reasonable to do so. Determining veracity requires the Arbitrator to take into account all of the evidence before making credibility findings.

The Arbitrator finds that when Ms McKrell confronted the grievant with serious errors, he first blamed others, but after Ms McKrell fact-checked him and informed him his explanation was untrue, he offered a new explanations. When Ms McKrell learned that the Elmridge project's risers were stacked double and leveled with metal shims, contrary to engineering practice and would become hazardous, over time, due to the pounding of traffic over the grates, she wanted an explanation, because he was in charge. Grievant informed her that he had assigned responsibility to Mr Curioso and he, the grievant, indicating he was hardly there and not therefore not responsible.

Looking into the matter, and contrary to the Grievant's statements, Ms McKrell learned from Mr Curioso that the grievant had sent Mr Curioso to the job site with a truck full of risers and told him to determine the proper riser heights. Mr. Curioso told Ms McKrell that he then contacted the Grievant and informed him that the catch basins already had risers and the department lacked risers of sufficient size. There was no time to delay. The paving was proceeding. Mr. Curioso then told her that the Grievant instructed him to double stack the risers.

Mr. Curioso also told her that the Grievant had instructed the Town's master mechanic, Steve Burdick, to prepare metal shims to level the catch basins. Ms McKrell learned from Ernie Santos, a Truck Driver and Laborer for the Town, a conversation he had with on the same day with the Grievant at the Elm Street project. Mr. Santos told the grievant that he was unable to get a grate to fit. The Grievant helped Mr. Santos try to fit the grate. When that failed, the Grievant told Mr. Santos to return to the Town Garage and pick up shims. He and Mr. Burdick cut the shims. Mr Santos returned to the Elm Street location with the shims and the Grievant helped him install the grate, and then left.

When Ms McKrell confronted the Grievant with this information, the Grievant undoubtedly knew that he could no longer deny and blame others, so her told her he had double stacked risers on other jobs and he believed the practice was sound. Mr. Curioso and Mr. Santos knew it was not. Ms McKrell concluded the Grievant's explanation was not credible. The arbitrator agrees.

Early in her tenure with the Town, paving season arrived. Ms McKrell and the grievant together planned which roads would be paved, as required by his job description. He gave hear a list of roads, in his handwriting, and said this was the list that he and her predecessor, Mr. Mcgraw, created. The costs were to be paid out of a 3.5 million dollar bond. The bond specified the roads to be repaired. After the work was done, Ms, McKrell compared the two lists, the grievant's and the bond's. Shocked, she learned she had paved some roads not listed. She thought at first she erred. She then decided to ask the Grievant for an explanation of the differences between his handwritten list and the bond. He told her the bond allowed deviations, if the Director of Public Works approved. When Ms. McKrell telephoned the person she had replaced, Mr. Mcgraw, to ask if approved the changes, he stated, to a listed road listed, that he would never have approved Mayflower. She looked in her office through the files left behind by Mr. Mcgraw and found no list. She reasonably concluded the grievant's explanation was not credible. The Arbitrator agrees.

During 2014, the levels of the catch basins on Pawcatuck Avenue were set too high. To bring the road up to the basins, the contractor had to apply 91.1 Ton

of aditional asphalt costing approximately $7,000. The grievant denied responsibility, claiming a consultant with CLA set the levels. On investigation, Ms McKrell discovered that the grievant, not the consultant from CLA, set the levels. Mr. Curioso told her that he, Mr Curioso, held the [surveyors] transom while the grievant set the levels. Ms McKrell believed the grievant was not being truthful. The Arbitrator agrees.

In his last month of his employment, when the grievant was under Ms McKrell's directive to make written daily plans, to help cure repeated instances of disorganization, Ms McKrell found from the computer data that he submitted planning data which he pretended was done in advance of the work, but in fact he created it a day or two later. He knowingly submitted false reports plans created after the fact. Ms McKrell concluded he fabricated false reports and submitted them, deliberately. The Arbitrator agrees.

The next episodes are important in assessing credibility. When Ms McKrell was first introduced to the employees in her department, the grievant was in the audience, and while listening to her talk, said, loud enough to be overheard by two credible witnesses, "this isn't going to happen." The Grievant denied it. Perhaps he couldn't remember saying it. This incident was not a subject of discipline. However, it indicates that from the very first, the Grievant was hostile to Ms McKrell.

The hostility continued. When Ms McKrell decided to change leaf collections procedures in the fall of 2014, he vigorously opposed her. He didn't like it. It was her decision to make, not his. The town posted a leaf truck schedule. Unable to change her mind, he twice disrupted the collection, first by ordering a leaf truck off duty and fitted with a show plow; and second by giving a vacation day to the Master Mechanic, a critical position, in the middle of leaf collection. His snow explanation was questionable – while some snow was predicted, on the day in question, it never snowed. The Ocean makes Stonington's climate more temperate than interior parts of Connecticut.

The grievant contended he had to grant the Master Mechanic vacation time off on request because the labor contract required it. The explanation is

untrue. The Labor Contract[13] does not allow an employee to take a vacation day whenever desired, regardless of operational needs. Ms McKrell believed the grievant needlessly gave a critical employee vacation time in the middle of the critical leaf operation to interfere with the collection. When considered in light of his expressed hostility, and his vigorous disagreement with her decision, the Arbitrator agrees with her assessment. While not part of the grounds for termination, this incident shows the grievant's hostility towards Ms. McKrell, and affects whether he was a credible witness.

The next incident was during a weekly meeting between the Grievant and Ms McKrell. Also present was Vincent Pacileo, Director of Administrative services, who had been attending the meetings at the Grievant's request, because of friction. In an angry outburst, the Grievant told Ms McKrell that he "didn't trust her as far as he could throw her." She was taken aback, shaken. When he related this incident during the arbitration, she broke down in tears. In another incident, the Grievant told her he had the right to leave the meetings whenever he determined. He left meetings without permission.

Just Cause

"Just cause" does not require the Town to prove all of the grounds cited for termination. If the Arbitrator finds proven ground for termination, then the Arbitrator must uphold the termination.

"Just cause" is an objective standard, defined over thousands of arbitration decisions between employers and their unions. Reasonable minds can differ over its application in a close case. The standard of "just cause" standard is not the same standard "arbitrary and capricious. The latter narrows the scope of the Arbitrator's authority under the "just cause" standard.

The Duty to Explain Expectations

"Just cause" requires the employer to tell the employee what to do before

[13] Article VII contains a provision that where the employee can't take a vacation because the Employer "cannot grant time off or has called the employee back from vacation. which cannot be rescheduled due to operational needs" the employee can take the vacation days later, even if outside of the anniversary date.

imposing discipline for not doing it. Ms McKrell had spoken with the grievant for a number of weekly meetings over a number of months, documenting each. The issues addressed on March 23, 2015 were hardly new to him.

In preparing for grievant's return from sick leave on March 23, 2015, Ms McKrell believed that despite many meetings over many months, the grievant was not doing his job properly. Supported by documented minutes from dozens of weekly meetings, her belief had a rational basis. He was not organized. So devised yet another plan to help him organize himself. I find her explanation reasonable and supported by the evidence Because grievant did not heretofore report his whereabouts, and his job required him to use a truck, there were times she believed that no one seemed to knew where he was. The Town has not claimed that he was moonlighting on working hours. But he was difficult to get hold of. He did not have regular office hours. He was failing to plan the work in advance, leading to waste and delay, such as when he failed to fill in trenches over a road scheduled for re-paving. He was failing to document work hours on a daily basis. He was failing to keep track of absences due to sick leave. These are all part of his job. Ms McKrell reasonably believed that over many months, and a number of meetings over this time period, that he was still failing to perform. So she made major changes to address these issues.

At the March 23, 2015, she provided him with Update of Work Memorandum. She reasonably could conclude that over many months of meetings and suggestions, he remained disorganized, and so was the Department, with incidents of inefficiency and waste. She divided his work-day for him to become more organized, including scheduled planning time. She obviously knew that when an employee is not planning properly, having that employee schedule planning time is important, but requires a schedule. She provided him with one. She moved his office from the Highway Department garage to the third floor of Town Hall, in the same building as the other Supervisors in the Bargaining Unit, and closer to her office. Her schedule put him in the department garage at the start of the day, obviously so he could determine who was at work, and document an absence to keep track of paid absences, which he had not been

doing properly, and to discuss the plans for the day. She had repeatedly told him during documented, weekly meetings, to prepare the jobs for the day in advance of each day. She gave him a schedule with planning time built in. She believed that with regular office hours, he would be more accessible.

Both planning time and office hours are standard management techniques. The Arbitrator rejects the Union claim that this was intended to humiliate him or prevent him from performing his work. The Arbitrator rejects the claim were a conspiracy to have him terminated.

She was requiring him to perform his job properly by giving him the organizational tools to make it succeed – she had provided him earlier with a data template, both digital and on paper. The arbitrator rejects the Union claim that this change prevented him from doing his job. He could change the schedule as conditions required. She required him to inform office staff when he left the building, not a burdensome requirement.

On March 23, 2015, Ms McKrell gave the grievant her minutes (which had seen before from their January 7, 2015 meeting), to remind him of the issues. The minutes included notes from prior meetings between them on December 3 and 18, 2014. She gave him a copy of the report on Elmridge catch basins and asked him to respond in writing. She drafted a performance improvement plan.

The Union contends she never gave the plan to the Grievant. The Union points out weaknesses in the plan. The contention is irrelevant. She told him what she expected. Indeed, “Just cause” does not require a formal improvement plan. “Just cause” requires that the employer inform the employee what is expected before disciplining an employee for not doing it. Imperfections in the creation of the improvement plan are irrelevant, if Ms McKrell clearly told him what to do. The evidence is, that she did. He knew he had to:

Schedule monthly department meetings
Complete the daily work assignment sheets every day.
Complete the weekly planning document every week.
Record hours worked on a daily basis
Record when each employee takes paid time off

On April 8, 2015, shortly after the March 23, 2015 meeting, at their weekly meeting she met with him again, and informed him 1) that he failed to schedule monthly meeting in advance using Outlook and 2) he was continuing to refuse to complete daily work assignment reports. She told him that completing the worksheets ahead of time allowed the Department to be efficient, and insure that all 18 employees were engaged in meaningful work for their full work-day. This was to address the problem that all 18 employees were not always engaged in meaningful work for their full work-day. She told him he could use spreadsheets or paper, and gave him several paper copies. She talked about Elmridge and his written response, where he put Mr. Curioso in charge and denied responsibility. The Arbitrator has already discussed the Elmridge paving project under the discussion of credibility and need not repeat it here.

The Arbitrator rejects the Union argument that the Town failed to adequately tell the grievant what he was expected to do or that he would be terminated if he didn't. Ms McKrell informed the grievant on March 23, 2015 of her expectations for performance. She did not then or thereafter repeat the warnings he already received when suspended in January. Those January warnings, unlike newspaper subscriptions, do not expire unless renewed.

The grievant continued after this meeting of March 23, 2015 to refuse to plan in advance daily for any of the employees he supervised. When at her request he provided her with the worksheet for April 20-April 24, 2015, he did not complete them correctly.

She then discovered from the Town's computer system that the grievant had not completed the daily and weekly worksheets ahead of time since he resumed work. He entered them after the fact and tried to pass them off as plans. In short, he repeatedly refused to perform this advance planning tasks and fraudulently covered it up by entering fraudulent documents after the fact.

The grievant's insubordination by itself warranted termination. Insubordination is the refusal of an employee to do as directed. Insubordination is a serious offense and warrants termination. It threatens to undermine the discipline of the employer. If one employee is seen to get away with disregarding

their supervisor, it may invite others to do likewise. It would undermine the productivity of the enterprise and the morale of its employees Insubordination is a fundamental challenge to management's right to control and direct the work force and often does not require a warning for the first offense, then a written warning, then a suspension, and then termination. Having said that, Ms McKrell repeatedly directed the grievant to perform the details of his job.

The evidence is overwhelming. The Grievant repeatedly refused to do as directed. In just a little over five weeks after his return from sick leave, he continued to refuse to do regular daily and weekly planning, refused to provide daily planning sheets, refused to record attendance on a daily basis, refused to keep track of employees' leaves of absences – there were eleven of them. If the grievant had a problem with the new schedule, if he felt it was unfair, or unwarranted, his remedy was to file a grievance, but to obey her directives. There is no evidence that he filed any grievance.

Even without considering the Elmridge paving program, and the other instances of incompetent supervision of paving contractors, the Arbitrator finds his insubordination after returning from suspension was regular, sustained, and deliberate, and establishes "just cause" for his termination. He placed himself outside of the ability of his supervisor to control his behavior. He engaged in fraud by passing off documents created after fact as planning documents created the day before. He demonstrated he could no longer be trusted to supervise a major Department of the Town, consuming a large budget and providing essential and visible services. Under the circumstances, the Employer had just cause to terminate. Progressive discipline need not be used when an employee refused after being continually ordered to perform the necessary functions of the job.

The grievant's conduct after his return from suspension was clear: he was demonstrating that he did not need to follow the directives of Ms. McKrell.

Before terminating the grievant, he Town provided Mr DiCesare with sufficient due process. As a public employee, who could only be discharged for cause, he had a property interest in his job under Connecticut law and therefore, under the Due Process clause of the 14th Amendment to the United States

Constitution, he could not be deprived of the job without due process of law.[14] The arguments addressed to the adequacy of the termination hearing under *Laudermill* [15] are irrelevant. The law is established that an arbitration – such as this one - under a collective bargaining agreement satisfies the due process rights. [16]

The Town conducted an adequate investigation. Ms McKrell had voluminous documentation, many times more than the average discharge case.

The Arbitrator rejects the Union argument prominently presented in the suspension arbitration, that the Town disciplined the grievant because of his Union activities. if true, the Town would violated the "just cause" standard, and committed a prohibited practice under Connecticut law. Discipline in retaliation for Union is a serious accusation, and Arbitrators must reinstate when proven, to protect collective bargaining. In order to establish retaliation, the Union must show the supervisor had knowledge of the employee's union activities. Ms. McKrell credibly testified she had no knowledge until shortly before the State Labor Board election. The Grievant's performance problems started well before that. He acknowledged he wanted Union protection because of Ms McKrell's supervision. There is no evidence that she expressed anti-union animus. She was familiar and experienced in working with a unionized work force. For five years, she supervised an office of twelve unionized employees, including professional engineers, draftsmen, and administrative assistants, on the property side of the Port of San Diego's operation(half of all the Port's operation), with a budget of 20 million dollars. The Stonington Town employees working under the grievant are Union members. There is no evidence of any complaints that she expressed opposition or hostility to Unions. She found fault with the grievant's performance occurred well before he petitioned to be part of the bargaining unit. The two events – her meetings with him to correct his performance and his petition to expand the Union's jurisdiction to his position so he would join the Union are only related in time. The coincidence of two events is not proof that one

[14] *Gilbert v. Homar*, 520 U.S. 924 (1997).
[15] *Cleveland Bd. of Educ. v. Loudermill*, 470 US 532
[16] *Adams v. Suozzi*, 517 F.3d 206 (2nd Cir 2008).

caused the other.[17]

Union's Other Arguments are Unpersuasive

The Union accuses the Town of creating false evidence. The evidence consisted of estimates of the cost of repairs. The estimates far exceeded the actual cost of $3 for a welder's bill. The Arbitrator finds no evidence that these estimates were in bad faith, only that they were wrong. When pointed out at the arbitration that claim was inflated, they were abandoned. The Town's claim stated by Attorney Satti that the grievant caused damage almost equal to his annual pay was unsubstantiated. That too was abandoned. It is not uncommon in proceedings, whether arbitration or court, for an attorney to make a statement which turns out to be unsubstantiated or contradicted. The $7,000 for 9.1. Tons of asphalt was accurate. Ms McKrell mixed up an incident, hardly surprising when considering the number in which she accurately recorded. The Town was wrong, but for a time believed it was accurate.

The Arbitrator rejects the Union contention that Ms McKrell created a bogus Performance plan. The Union pointed out it was not well constructed in that it had no criteria for determining performance, and she turned down suggestions for its improvement, but the Arbitrator finds she was acting in good faith. Her objective, which she had followed for months and exercised with extreme forbearance in light of his behavior, was to improve his performance. The Performance Plan became irrelevant when the grievant continued in his last few weeks of employment continued to engage in repeated insubordinate refusal to obey her directives. A Performance Plan is not required by "just cause." What is required is that Town inform him what he is doing wrong and give him a chance to improve. Ms McKrell did that repeatedly over many months. She credibly testified that only when he failed to improve by discussion did she switch to

[17] That one event comes after another does not prove the former caused the latter. "Post Hoc, Ergo Propter Hoc" (After this, therefore because of this.")

discipline. The Town suspended him for 5 days, with a stiff letter to improve or be terminated. He went on sick leave. He returned to work. On his return, she met with him on March 23, 2015 and spelled out with detailed specifics what was expected.

Thereafter, the end came after he worked 25 days, not because as the Union alleges that she engaged in a conspiracy to terminate him, but because of his refusal to perform his job.

The Arbitrator rejects the Union's claim that it was unfair for Ms McKrell to give him only thirty minutes to prepare for a "pre-termination hearing." It was a pre-termination "investigation", not a pre-termination termination "hearing." He was entitled to no advance notice of the questions. It was his chance to come in and answer questions, tell his side of the story. He cannot delay discipline by refusing to cooperate in a pre-termination investigation. The grievant tried and it didn't work. He was terminated that day.

The Arbitrator rejects the Union argument that Ms McKrell moving the Highway Supervisor office back to the highway garage after the grievant's departure shows she had an improper motive in moving the grievant from the garage to Town Hall. His replacement did his job without close supervision. The grievant did not. The grievant needed close supervision. His replacement did not. The replacement was successful, and to be successful, was organized. The grievant was neither.

The Arbitrator rejects the implied criticism in the Union's contention that the Grievant did not personally investigate the Elmridge Road stacked risers. The point is not entirely clear. She sent an engineer to investigate. The engineer filed a detailed report. She read it. She was entitled to accept it.

The Arbitrator rejects the Union argument Town misstated the danger of the stacked risers by waiting four months to send out a welder. The evidence shows the stacked risers were not immediately dangerous but could become so over time with the constant weight of traffic pass over the grates. When the risers became dangerous is not relevant. The point is that over time, they could become dangerous. The Town overstated the immediate seriousness of the stacked

risers. The Town overstated the cost of repairs, which the Arbitrator finds was a welder's fill of $325.00. The important fact is that he was not truthful when he denied being responsible for it, and his decision to stack them was not consistent with safe practices.

The Arbitrator rejects the Union's argument that Ms McKrell, believing the grievant was not capable of managing the Elmridge Road project, should not have assigned the Grievant the Elmridge Road. Ms McKrell credibly testified that she had misgivings but he asked her to assign it to him. The grievant asked her. She didn't ask him. It was also part of his job, not her job. She agreed, and at the arbitration offered these reasons: He not only asked, he pleaded; He stated he wanted to prove himself; He stated her predecessor would have assigned it to him. She also knew the Town First Selectman had told her not to hire more consultants. So giving it to him satisfied both him and the Town's need to control costs. The Union's contention that her only reason was the First Selection's directive is not accurate. She credibly testified she had two reasons.

The Union contends moving the his office was unjustified, that there was no evidence that the other bargaining unit supervisors in Town hall were out in the field, nor was there evidence they were required to notify administrative staff when leaving. The argument is not persuasive nor is it relevant. Ms McKrell reasonably believed there were times the Grievant could not be found and no one knew where he was, that he needed set time to conduct planning, that he should be closer to his supervisor so they could communicate, that he needed regular office hours, that the source of many of his problems was he was not organized and did not plan in advance. So the Town made administrative changes. No proof of wrongdoing is needed for administrative adjustments.

These are within man agent's contractual rights under the Management's Rights Clause, Article III. Among the rights listed are these: " the right to manage its operations, " and "to make all plans and decisions on all matters involving [the Town's] operations" and "to maintain discipline and efficiency of employees."

The Arbitrator rejects the Union argument that Ms McKrell's purpose was to get rid of him. The evidence shows that Ms McKrell reasonably believed,

based on extensive experience with him, that he had one last chance to save his job, that he could not plan his own activities, so she created an organization for him and told him exactly what he had to do.

If the schedule needed to be changed, the Grievant could initiate a change and if the changes were refused, he could file a grievance. There is no evidence that he asked Ms McKrell to change the schedule, nor is there evidence that she denied any requests for change, nor did he file a grievance. Far from telling him the schedule could not be changed, she told him he could change it, but he needed to give notice.

The Union contends Ms McKrell unreasonably ordered the grievant to stop using paper notes on the wall to record attendance and hours worked, but his successor used the paper on the wall. The Arbitrator rejects the argument. Ms McKrell's problem with the grievant was that he waited two weeks to record attendance. She ordered him to do it daily. She reasonably believed that the paper slip method was not working for him. Thereafter, he continued to refuse to enter attendance on a daily basis. The issue therefore was not so much the paper on the wall, but he couldn't make it work because he was waiting two weeks, rightfully believed that his method invites inaccuracies. Memories fade. His successor does keep daily records of attendance and time worked. His successor made the paper on the wall method work. The grievant did not. And the Grievant never asked for a change back to paper.

She discovered additional insubordination during this last 25 days by refusing to record the reason for eleven employee absences. She discovered he was insubordinate during his last 25 days by refusing to prepare daily and weekly plans within the time frame ordered by her. She discovered from the computer records that the daily plans he was filing were not planning documents, but created after the event. This fraud was a last straw. He knew or should have known that this dishonest behavior was inappropriate and could lead to discharge. An employer does not need to warn an employee not to be dishonest.

The Arbitrator rejects the Union argument that the investigatory interview did not meet his *Weingarten* rights. Since he had already made up his mind not to

cooperate before the meeting started, and stated he was refusing on advice of counsel, and only answered one question, there no reason to substituting Roger Kiser, Union President, to sit in the room to listen to him refuse to answer questions and walk out. The argument places form over substance. This interview was for investigation. It was to give the grievant a chance to give his side of the story, and for management to consider his version before imposing discipline.

In the interests of economy, the Arbitrator has not included in this Opinion and Award all the other incidents and arguments produced in these sixteen days of hearings. They would not have changed the result. The absence of any discussion of any of myriad contentions does not imply that they were not considered.

The town replaced the grievant after his April 2015 departure. The evidence shows the replacement is performing all of the tasks the grievant could not. The replacement completes daily week sheets in advance. He competes weekly plans. He keeps track of hours worked every day for eighteen employees, not once every two weeks. He keeps track of leave time for each employee, how much they have taken and how much they have left. His replacement can accurately perform these tasks. The grievant did not. The grievant was terminated. The replacement is still employed.

The Arbitrator would like to acknowledge the superb briefs filed by the attorneys in both the discharge arbitration and the termination arbitration.

AWARD

1. The grievance is Arbitrable.
2. The Town had Just Cause to terminate the Grievant, Louis DiCesare II.
3. The grievance is denied.

Dated: February 1, 2019 _____

Peter L. Adomeit, Esq. Arbitrator